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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-229

MARSHALL P. SAFIR,

Petitioner,

—v.—

ROBERT W. BLACKWELL, Assistant Secretary of Commerce for Maritime Affairs, Successor to and Substituted for ANDREW GIBSON; JAMES S. DAWSON, JR., Secretary Maritime Subsidy Board and FREDERICK DENT, Secretary of Commerce, Successor to and Substituted for MAURICE STANS,

Respondents.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI

MARSHALL P. SAFIR, *Pro se,*
41 Flatbush Avenue,
Brooklyn, N. Y. 11217
(212) 858-2700

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In accordance with Rule 58, paragraph 2 of the Rules of the Supreme Court petitioner requests a rehearing on the grounds that since the time of the filing of the memorandum for the Federal respondents in opposition and the denial of the petition for writ of certiorari on October 23, 1973 that the final order of the Maritime Subsidy Board in S-243 was served.

Since the major objection expressed by the Solicitor General to the grant of certiorari was based on the posture of unfinality of the April 16, 1973 order of the Maritime Subsidy Board, the Order of October 10, 1973 served October 15, 1973 now meets the test for finality. The Solicitor General points to *Boston Marine Terminal Association* v. *Rederiaktiebobolaget Transatlantic,* 400 U.S. 62, 71—in his brief in opposition. It can now be stated that the process of administrative decision making has reached a stage where judicial review will not disrupt the orderly process of adjudication and the rights and obligations have been determined and legal consequences flow from the Agency action.

The final decision in S-243 is attached hereto as Supplemental Appendix Exhibit 15.

Petitioner prays that his petition for rehearing on the order be granted and certifies that it is presented in good faith and not for delay and that the petition for rehearing is restricted to the grounds above specified.

Respectfully submitted,

MARSHALL P. SAFIR,
Pro se.

SUPPLEMENTAL APPENDIX EXHIBIT 15

U.S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
MARITIME SUBSIDY BOARD

DOCKET NO. S-243

Investigation of Alleged Section 810 Violation

In the matter of the complaint of Sapphire Steamship Lines, Inc. re alleged violation by Atlantic and Gulf American Flag Berth Operators (AGAFBO) of Section 810 of the Merchant Marine Act, 1936, as amended.

FINAL ORDER ON RECOVERIES

Chairman, Robert J. Blackwell and Alternate Member, James S. Dawson, Jr.

Introduction

On April 16, 1973, the Maritime Subsidy Board (Board) served an Opinion and Order in this proceeding[1] which concluded that all respondent members of Atlantic and Gulf American Flag Berth Operators had violated Section 810 of the Merchant Marine Act, 1936, as amended (Act), by certain actions which unjustly discriminated and unfairly competed against Sapphire Steamship Lines Inc. That de-

[1] The Opinion and Order is reissued on this service date to reflect corrections for clerical errors appearing in the original served decision. It is attached as an Appendix to this Final Order on Recoveries.

cision also set forth, on an estimate basis only, the operating-differential subsidy (ODS) recoveries, if any, owed by each respondent, for such violations upon due consideration of mitigating circumstances. Trade respondents—American Export Lines, Inc. (AEL), Bloomfield Steamship Company (Bloomfield), Lykes Bros. Steamship Co., Inc. (Lykes), Moore-McCormack Lines Incorporated (Mormac), and United States Lines, Inc. (USL)—and Public Counsel were given an opportunity to submit their views and supporting documentation on the exact ODS amounts recoverable under said decision. All trade respondents filed such submissions and most of them filed statements requested by Public Counsel on the source and availability of documents supporting their recovery positions. Public Counsel directed a MarAd audit of the submissions of the trade respondents based on the limited available existing records. He thereafter filed a Final Report, twice supplemented, which included the reports of such audit and which responded to the submissions of the trade respondents. Upon consideration of these papers, we find and conclude, for the reasons set forth hereinafter, that trade respondents owe in ODS recoveries for violation of Section 810 of the Act, as found in the Opinion and Order served April 16, 1973, an aggregate of $2,388,463.16.

Discussion

We consider first the propriety of issuance of this Order at this time and thereafter the ODS recovery from each of the trade respondents separately. It is understood that the positions on recoveries by all the trade respondents are without prejudice to their contentions of not having violated Section 810 of the Act.

Propriety of This Order at This Time

We are cognizant of the outstanding petition of Marshall P. Safir to the Supreme Court of the United States for a writ of certiorari to the Second Circuit to reverse that lower

court's order denying Mr. Safir's petition to reverse the Opinion and Order served April 10, 1973. (sic.) There is no judicial action in connection with that unresolved petition that precludes the issuance of this Final Order.[2] In fact, the Board is under a judicial order on mandate to proceed "without delay" with this decision.[3]

AEL's Recovery

AEL states that it "has established that the Board's approximate mathematical calculation is exact and that under the formula AEL should return $38,036 to the Government." Public Counsel laments the lack of original records from which to verify AEL's figures but suggests that if such records were not promptly located, then final figures be determined from the audit report of AEL's submission.

The MarAd audit report concluded that AEL's submission could not be verified because of the lack of supporting data, such as individual manifests and bills of ladings, from which AEL's submission was drawn. AEL indicated it is still in the process of locating such data. The audit report also claimed AEL's maintenance and repair ODS figure was understated by $1,695.10 resulting in understatement of subsidy due for violation of Section 810 of $14.25 (13.5% of $1,695.10 times 24.92% military cargo percentage, less 25% mitigation reduction). AEL has not commented on this correction asserted by MarAd's auditors.

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[2] The Safir petition would not stay the action of the lower court unless the Supreme Court or the Court of Appeals so directed, 28 U.S.C. § 2101(f) (1970). Neither the Supreme Court nor the Court of Appeals have so directed. Even if the lower court's order were stayed, it is doubtful that such stay would bar the Board from proceeding in the absence of some judicial communication to MarAd, the Department of Commerce, or the Department of Justice.

[3] *Safir* v. *Gibson*, 432 F.2d 137, 143 (2d Cir.), *cert. denied*, 400 U.S. 942 (1970), Order on Mandate of the U.S. Court of Appeals for the Second Circuit, Docket 680643 (E.D.N.Y. 1970).

We find and conclude that AEL owes an ODS recovery of $38,050.25 for violation of Section 810. In the event additional pertinent records are uncovered subsequent to this order, which would provide a basis for substantially changing the exact ODS recovery from AEL, then AEL's recovery can be reopened. Such eventuality seems extremely unlikely given the fact that such records are now several years old with all the sundry happenstances that could have occurred to them and also given the amount of effort purportedly already exerted to locate such records.

BLOOMFIELD'S RECOVERY

Bloomfield claims that it owes $119,900.54 as ODS recovery under the Board's Opinion and Order as compared to the $140,450 estimated by the Board in that decision. It contends that any recovery is subject to interest payments owed by the Government for withholding from Bloomfield $121,893.67 in ODS payments accrued in 1965. Public Counsel supports the MarAd auditor's report on Bloomfield's submission. The report indicates that there were insufficient supporting data available to express an opinion as to the overall accuracy of the submission, but that to the extent Bloomfield's manifests were available they confirmed that company's recitation of cargo reports.

Bloomfield's claimed recovery excludes any consideration for revenue earned from military cargo carriage at undisputedly lawful rates during the period of violation of Section 810. Bloomfield, along with Lykes and Mormac, argues that under the rationale of the Board's decision such revenue was to be excluded in calculating the ODS recovery. The applicable principle of the Board's decision, according to Bloomfield, is that "the penalty should bear the same percentage to accrued subsidy for the violation period as earnings from all cargo carried at the alleged illegally reduced rates bear to earnings from all cargo." Lykes adds that the Board assumed there was no such military cargo

whereas in fact such cargo was carried "at the constant rate levels which did not unfairly affect the Sapphire operation." Public Counsel indicates that such adjustments advocated by Bloomfield, Lykes and Mormac "appear to be refinements of the principle enunciated by the Board in the outstanding Opinon and Order . . . ."

The adjustment sought by Bloomfield, Lykes and Mormac is not a refinement of any principle previously established in this proceeding. In the Opinon and Order we made the legal conclusion that under Section 810 all ODS paid during past violations may be recovered and that we have discretion to mitigate such recoveries. The recoveries for all trade respondents were mitigated to the following percentage formula of ODS:

> "After carefully considering all of the facts and policy objectives of the Act applicable to trade respondents' violations, we are persuaded to further limit their recovery to the same percentage of specified ODS payments as military cargo revenues bore to total revenues on the trade route whereon the condemned rate reductions were in effect." (p. 61)

This formula was restated for Lykes as follows:

> "Hence, the amount to be recovered from Lykes is the percentage of ODS receivd from subsidized operations on the U.K./B-H range, as represented by the ratio of military cargo revenue received on such route to total revenues received therefrom during the period of violation." (p. 62)

The underlying principle of this formula is that recoveries would be mitigated to a certain level—a ratio of ODS involving all military cargo revenue received on the route during the violation.

Further, at the time of the Opinon and Order the Board was aware that its formula took into account some military

cargo by trade respondents at lawful rates even though the exact quantum of that carriage was not of record. For instance, the Board's decision referenced condemned military cargo rate reductions which occurred "during" the period March 29, 1965 to March 1, 1966; the Chief Judge's Initial Decision and the FMC decision in Docket No. 65-13[4] referred to several condemned military rate reductions that occurred subsequent to March 29, 1965; and Public Counsel, in particular discussed these other condemned military rate reductions in his proposed Findings of Fact at 20-21. It follows that it was apparent that some military cargo was carried by respondents after March 29, 1965, at lawful rates before the rates on such cargo were unlawfully reduced. However, preponderantly trade respondents carried military cargo at the condemned rate reductions on the Bordeaux/Hamburg range during the period of violation.

Moreover, we are not persuaded to extend further our discretion in this instance to reduce the recoveries owed by trade respondents for violation of Section 810. In the Opinion and Order we carefully considerd all the asserted justification for such mitigation and no new justification is presented by trade respondents in their latest submissions.

Bloomfield also asserts that the Board owes interest under its ODS Contract No. FMB-27 on the final audited subsidy voucher for $121,893.67 from June 1966 (the date of submittal of "a voucher for the remaining subsidy due") to June 1971 (the date of a court order enjoining subsidy payment[5]) and beyond. The subsidy contract requires payment of net subsidy due upon final accounting which shall be paid as soon as practicable upon termination of the subsidy agreement. Bloomfield claims that administrative

[4] Docket No. 65-13, *Rates on Government Cargoes, 11 F.M.C. 263, 287 (1967).*

[5] Memorandum Incorporating Findings of Fact and Order dated June 22, 1971, and resettled July 26, 1971 (E.D.N.Y.).

agencies can and do permit interest to be taken into account in making contract adjustments and settlements and that interest is assessed when the Government fails to fulfill its obligation as in this instance.

Public Counsel contends that the applicable voucher was dated January 23, 1970, after commencement of this proceeding, and that such voucher included the recital by Bloomfield that all terms of the subsidy contract had been complied with. He argues that since the purpose of this proceeding was to determine whether Bloomfield was in compliance with its contract and since Bloomfield was in defunct status, there was ample basis under the contract to give the voucher cautious consideration. Further, he cites the statutory provision that interest is not assessed against the Government except where explicitly allowed by statute or contract, 28 U.S.C. §§ 2411, 2516 (1970), and distinguishes cases cited by Bloomfield. He asserts that neither Bloomfield's subsidy contract nor any implementing regulations permit recognition of interest in the event that a final accounting is not processed immediately for payment.

We completely concur with Public Counsel's position on this matter that there has been no improper or illegal withholding of subsidy and that no statute, subsidy contract, or implementing regulation permits recovery of interest against the Government for such withholding.* Consistent with this

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*Bloomfield cites *Bell* v. *United States*, 404 F.2d 975, 984 (Ct. Cl. 1968), and *Peoria Tribe of Indians of Oklahoma* v. *United States*, 390 U.S. 468 (1968). In *Bell* the Court of Claims found that the contract under Department of Defense policy permitted recovery of interest under the changes clause on moneys borrowed by the contractor necessitated by the change. Neither the Department of Commerce nor MarAd have a policy of permitting recovery of interest under construction or operating subsidy contracts. See *Sun Shipbuilding & Dry Dock Company* v. *United States Lines, Inc.* 12 S.R.R. 551, 598 n. 39 (1971). In *Peoria* the Supreme Court did not allow interest as part of damages for the

[Footnote continued on next page]

view we concluded in the outstanding Opinion and Order that interest charges are not recoverable under Section 810 of the Act since interest is not and cannot be an element of ODS payment.

In conclusion, we find that Bloomfield owes $139,039.60 in ODS recovery for violation of Section 810 of the Act ($750,551.12 ODS times 24.7% military to total freight revenues times 75% mitigation reduction) and that no interest payments from the Government for withholding accrued subsidy offsets that recovery. The withheld $121,893.67 in ODS payments is hereby acknowledged as partial satisfaction of amounts owing for such violation.

LYKES' RECOVERY

Lykes calculates the ODS recovery due the Government in this proceeding is $764,264.53 compared to the estimated recovery of $1,130,123 in the Board's decision. The difference is attributed to more exact figures and calculation of ODS on a per diem rather than on a termination basis. Lykes contends the recovery should be reduced to $703,920.67 so as to exclude any subsidy paid for carriage of military cargo not carried at the condemned reduced rates. Public Counsel adopts the MarAd audit report on Lykes' submission, which report, except for a minor correction, concludes that Lykes' submissions properly reflect the amount of subsidy subject to recovery in this proceeding. The one correction refers to Lykes' overstatement of subsidy by approximately $5000. Taking into account the correction, Lykes would owe in recovery, based on the Board's Opinion and Order, $762,891.99 ($2,725,587.69 ODS times 27.99% military to total freight revenues ratio).

Government's breach of its fiduciary obligations under treaty since "the United States is not liable for interest on judgments in the absence of an express consent thereto. . . ." 390 U.S. at 473 n. 6. It therefore suggested that if an interest rate *measure* were adopted for determining the damages, it must be simple and not compound interest.

We have previously discussed and decided not to accept the advocated adjustment for revenue from carriage of military cargo at lawful rates during the period of violation. As for Lykes' different method of accounting we note that the accounting bases for all trade respondents vary considerably. However, these different bases have been reviewed by MarAd auditors, who have concluded, to the extent underlying data is available, that each submission is reasonably responsive to the directive in this proceeding. We concur with that judgment. Accordingly, we find and conclude that Lykes owes $762,891.99 in ODS payments for violation of Section 810.

MORMAC'S RECOVERY

During the period of violation Mormac operated on Trade Route No. 6 with the authority to make calls on ports in the Bordeaux-Hamburg range (Trade Route 7-8-9) in certain instances. Mormac suggests that the subsidy paid for operation on the Bordeaux-Hamburg range be computed from the ratio of revenue carried on that range to the revenue earned on the entire trade route (T.R. 6-7-8-9). On such basis it calculates the ODS recovery under the Board's outstanding Opinon and Order as $281,497 instead of the Board estimated recovery of $492,443. Mormac's calculation includes three adjustments to eliminate (i) revenue from cargoes carried on unsubsidized voyages during the strike period in June, July and August of 1965, (ii) revenue from carriage of refrigerated cargoes at lawful rates on the Bordeaux-Hamburg range, and (iii) revenue from other military cargo carried at lawful rates on the Bordeaux-Hamburg range. Public Counsel offers no objection to Mormac's proposed recovery and relies on the MarAd audit report of Mormac's submission. MarAd's auditors concluded that Mormac's submission was a reasonable representation of the data required in this proceeding although they could not give complete verification in the absence of certain underlying data.

As previously discussed, we have already decided not to make any adjustment in recoveries for carriage of military cargoes at lawful rates on the Bordeaux-Hamburg range during the period of violation. On the other hand, we are persuaded to make an adjustment in Mormac's recovery for revenues earned from cargoes carried on unsubsidized voyages during the strike period. No Government support was paid for such operation and Mormac held no advantage over Sapphire Steamship Lines Inc. by such unsubsidized operation.

With respect to Mormac's recovery and military reefer cargo the Board made the following statement in its Opinion and Order:

> "The military cargo revenue figures include revenue from carriage of military refrigerated cargo since we are not persuaded to further mitigate Mormac's recovery to exclude such cargo, even though Sapphire's carriage of such cargo was of a limited amount." (p. 65, note 63)

The essential point is that the Board refused to further exercise its discretion to limit Mormac's recovery on account of this reefer carriage. Mormac may be contending that the amount of Sapphire's carriage of this cargo is relevant because Sapphire could not have sustained any injury from Mormac's military reefer carriage and therefore its recovery should be accordingly mitigated. The reference to the "limited amount" of military refrigerated cargo carried by Sapphire was to Mr. Safir's testimony that a Sapphire vessel had carried a reefer container (which presumably contained refrigerated cargo) although the Sapphire ships did not have reefer capacity built into them. However, the quantity of military refrigerated or reefer cargo carried by Sapphire is not relevant because we have already held that, "even as a factor of mitigation, . . . [t]his proceeding is not concerned with the injury to Sapphire" but rather with "poli-

cies regarding recoveries from respondents for actions intending injury to Sapphire and affecting the welfare of the U.S. merchant marine."[1] Mormac's analogy to the following finding on USL's passenger service is not apposite:

> "In view of the dissimilarity of passenger and cargo ship operations and of Sapphire having operated no passenger ships, we are persuaded, as a matter of discretion, that recovery from USL for past violation of Section 810 should not be related to subsidies received for such passenger ship operations. No other trade respondent operated any passenger ship on a subsidized service on the U.K./B-H range during the period of violation." (p. 53)

This unique circumstance is not comparable to Mormac's carriage of military reefer cargo. Mormac did not have a military reefer service but rather presumably a commercial freight service. USL had a passenger service.

Accordingly, we find and conclude that Mormac owes for violation of Section 810 of the Act $386,776.56 in ODS recovery ($968,091 ODS times 53.27% military [$2,454,640] to total freight revenues [$4,607,384] ratio times 75% mitigation reduction), which amount will be withheld from the ODS accrued during the period of violation and not yet paid pursuant to court injunction.

USL's Recovery

USL calculates its recovery as $1,056,074.62 as contrasted to the estimated recovery of $969,751 in the Board's Opinion and Order. Public Counsel supports the MarAd audit report of USL's submission and recommends that the Board not await the possibility of further USL records being located but urges that the final decison be issued "subject to reopening in the event such records are re-

[1] Opinion and Order, served April 16, 1973, at 36.

trieved." MarAd auditors could not certify to the complete accuracy of the USL submission because of the absence of underlying manifests and bills of ladings but did conclude that the submission, with minor adjustments, was a reasonable representation of the data required in this proceeding. The significant correction concerned revenue statements. The auditors used figures reflected in the applicable Estimated Operating Result Statements while USL relied on data in Vessel Operating Statements. The latter Statements have apparently been destroyed in the ordinary course of USL's business. The net effect of this procedure was to increase the subsidy applicable to military cargo by $9,665.53 or a recovery of $1,061,704.76.

We find and conclude that USL owes $1,061,704.76 for violation of Section 810 of the Act, based to the extent possible, on existing records. As in the situation of AEL, this determination is final but if additional pertinent records should unexpectantly be uncovered which would materially change USL's recovery, that recovery can be readjusted.

CONCLUSION

Based upon the Opinion and Order served April 16, 1973, in this proceeding and the foregoing discussion, we find and conclude that:

1) All respondents violated Section 810 of the Merchant Marine Act, 1936, as amended, and applicable provisions of their ODS contracts by acting in concert to reduce rates on selected military cargo carried in the U.S. Atlantic & Gulf to United Kingdom/Bordeaux/Hamburg area and holding such rates at such levels during the period of March 29, 1965 to March 1, 1966 (but as to respondent Bloomfield Steamship Company, only until and including December 31, 1965) in order to unjustly discriminate and unfairly compete against Sapphire Steamship Lines Inc., and

2) In consideration of pertinent mitigating circumstances respondents owe the following ODS recoveries, if any, subject to readjustment upon the unlikely discovery of additional pertinent documentation which would substantially alter said recoveries:

   (a) Respondents American President Lines, Ltd., Farrell Lines Incorporated, Grace Lines, Inc. (presently Prudential-Grace Lines, Inc.) and Prudential Lines, Inc. (presently Prudential Steamship Company, Inc.), who did not compete with Sapphire and whose violations are technical only, no amount;

   (b) Respondent Lykes Bros. Steamship Co., Inc. $762,891.99 to be accounted for on terms satisfactory to the Government;

   (c) Respondent American Export Lines, Inc. $38,050.25 to be accounted for on terms satisfactory to the Government;

(d) Respondent Moore-McCormack Lines, Incorporated $386,776.56 to be withheld from operation subsidy amounts presently owed and incurred during the period of violation;

(e) Respondent Bloomfield Steamship Company $139,039.60 partially to be withheld from operating subsidy amounts of $121,893.67 accrued during the period of violation but not yet paid;

(f) Respondent United States lines, Inc. $1,061,704.76 to be accounted for on terms satisfactory to the Government.

SO ORDERED BY THE
MARITIME SUBSIDY BOARD/
MARITIME ADMINISTRATION
Date: October 10, 1973

/s/ AARON SILVERMAN
AARON SILVERMAN
Assistant Secretary